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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE ROGER T. BENITEZ)

UNITED STATES OF AMERICA,) No. CR 08-1455 BEN
Plaintiff,)
) **MOTIONS TO:**
v.) **(1) SUPPRESS EVIDENCE AND**
) **STATEMENTS;**
ARA E. AVETYANTS, et al.) **(2) GRANT LEAVE TO FILE FURTHER**
Defendants.) **MOTIONS; AND**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT THEREOF**

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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

This statement of facts is based on Government reports provided to defendant AVETYANTS thus far in discovery. Defendant does not accept this statement of facts as his own statement, and reserves the right to take a contrary position at motions or trial.

INITIAL STOP

Discovery reports indicate that on April 26, 2008, at approximately 10:15 a.m., Border Patrol Agent K. Zoetewey, announced over the service radio that he was conducting a vehicle stop on Monument Road approximately one quarter mile East of Hollister Street. The discovery indicates that "prior to the vehicle stop, the three occupants of the vehicle were seen throwing out trash, receipts, and banking documents from the vehicle."

The discovery does not list any factors that purportedly justified the agent's suspicion to eventually stop the vehicle. According to discovery provided, defendant AVETYANTS was the driver of the vehicle, and co-defendants MOTIVOSYAN and BARSEGIAN were passengers of the vehicle.

1 Agent Zoetewey stopped the vehicle, approached the
2 occupants and conducted an immigration inspection. All three
3 defendants who were occupants in the vehicle provided to the
4 agent valid immigration documents. At all times, as a backup
5 Agent, Agent Stallings waited at the passenger side rear of the
6 vehicle while Agent Zoetewey was conducting the immigration
7 inspection.
8

9 Border Patrol Agent Zoetewey started questioning the
10 defendants. It is alleged that the occupants, though not clear
11 who made the statement, further responded to the agent that they
12 were in the area "looking to ride some horses." Thereafter, the
13 defendants were released and allowed to drive away.
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16 **SECOND STOP**

17 About two hours later, Border Patrol Agent Stallings saw
18 the people from the earlier stop walking in Border Field State
19 Park. Thirty minutes after the second sighting, near the
20 entrance to that same park, Agent Stallings saw the car that was
21 stopped earlier with four doors open. This led Agent Stallings
22 to believe four people were trying to get into the car. The
23 agent stated that he was "suspicious" that there were four
24 people instead of three. **The agent again approached the four**
25 **people who were sitting on a log and performed an immigration**
26 **stop on all four people, including the three people who had**
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28

1 already cleared the immigration stop with him earlier that day.

2 Agent Stallings again verified that the three defendants had
3 valid immigration documents. However, the fourth person (the
4 material witness) only produced a California Driver's License.
5

6 Despite having proper immigration documentation, Agent
7 Stallings began questioning the three individuals and asked them
8 if they remembered him from their earlier encounter. They
9 nodded yes. Statements were made in English about the fourth
10 person and what they were doing in the park; however, it is
11 unclear who made the statement.
12

13 While records were being checked for the fourth person,
14 Agent Stalling asked defendant AVETYANTS if it was okay to
15 search the vehicle. Defendant AVETYANTS allegedly gave Agent
16 Stalling consent to search the vehicle.
17

18 A records check revealed that the fourth person was denied
19 asylum in January 2008. All four people were arrested.
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21 ARGUMENT

22 23 I. THE INITIAL STOP OF DEFENDANT AVETYANTS' VEHICLE 24 BY THE BORDER PATROL AGENT ZOETWEY WAS UNLAWFUL

25 The stopping of an automobile and detaining its occupants
26 constitutes a "seizure" within the meaning of the Fourth and
27 Fourteenth Amendments, even though the purpose of the stop is
28

1 limited and the resulting detention quite brief. Delaware v.
2 Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59; L. Ed. 2d
3 660 (1979).

4 **As the U.S. Supreme Court has noted, "[E]ven assuming that**
5 **purpose [to prevent crime] is served to some degree by stopping**
6 **and demanding identification from an individual without any**
7 **specific basis for believing he is involved in criminal**
8 **activity, the guarantees of the Fourth Amendment do not allow**
9 **it.** When such a stop is not based on objective criteria, the
10 risk of arbitrary and abusive police practices exceeds
11 tolerable limits." Brown v. Texas, 443 U.S. 47, 52 (1979). The
12 Court has also insisted that **"[A person] may not be detained**
13 **even momentarily without reasonable, objective grounds for**
14 **doing so."** Florida v. Royer, 460 U.S. 491, 498 (1983) [Emphasis
15 added].

16 The Fourth Amendment forbids stopping a vehicle even for
17 the limited purpose of questioning its occupants unless police
18 officers have a founded suspicion of criminal conduct. United
19 states v. Salinas, 940 F.2d 392, 394 (9th Cir. 1991); United
20 states v. Ramirez-Sandoval, 872 F.2d 1392, 1395 (9th Cir. 1989).

21 The Fourth Amendment applies to investigative stops of
22 vehicles. United States v. Garcia-Camacho, 53 F.3d 244, 245 (9th
23 Cir. 1995); see United States v. Brignoni-Ponce, 422 U.S. 873,
24

1 878, 95 S. Ct. 2574, 2578-79 (1975). Such stops must be
2 predicated on at least reasonable suspicion of wrongdoing.
3 Garcia-Camacho, 53 F.3d at 245-46.

4
5 The Ninth Circuit has held, in the context of a roving
6 patrol stop, that the following factors, when considered
7 jointly, were insufficient to justify an investigatory stop:
8 (1) the nervous demeanor of both the defendant and his
9 passengers as they sat in the truck; (2) the reduction in
10 speed from 65 to 55 m.p.h.; (3) the presence of a two-way
11 antenna on the trunk of the vehicle; (4) defendant's residence
12 in a neighborhood on the U.S.-Mexican border which was under
13 investigation for narcotics activity; (5) the license plate
14 bracket indicating that the car had been purchased from a
15 dealership associated with drug trafficking; and (6) the size
16 of defendant's trunk. United States v. Hernandez-Alvarado, 891
17 F.2d 1414, 1416-1417 (9th Cir. 1989). Even under a totality of
18 circumstance test, the Ninth Circuit held that these factors
19 were insufficient to establish reasonable suspicion.
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23 Turning to the facts of this case, on April 26, 2008, the
24 only "facts" within Border Patrol Agent Zoetwey's knowledge at
25 the time he stopped the vehicle were that (a) he was conducting
26 line-watch duties on Monument Road in the Imperial Beach; (b)
27 the area is notorious for the presence of undocumented aliens;
28

1 (c) he observed the occupants of the vehicle throwing out
2 trash, receipts, and banking documents from the vehicle. Even
3 arguendo if all this is true, these facts do not rise and fail
4 to establish reasonable suspicion to conduct an investigatory
5 stop.
6

7 The Border Patrol Agent Zoetewey clearly had a general
8 curiosity to explore and he improperly stopped defendant
9 AVETYANTS' vehicle to satisfy his curiosity. Such tactics by
10 the Border Patrol Agent violate both the letter and spirit of
11 the Fourth Amendment. Border Patrol Agent Zoetewey's conduct
12 violated well-established fundamental Constitutional
13 principles.
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17 **II. THE WARRANTLESS SECOND STOP OF DEFENDANT AVETYANTS**
18 **WAS UNREASONABLE AND VIOLATIVE OF HIS RIGHTS**
19 **PROTECTED BY THE FOURTH AMENDMENT OF THE UNITED**
20 **STATES CONSTITUTION; ALL EVIDENCE DERIVED THEREFROM**
21 **MUST BE SUPPRESSED AS 'FRUIT OF THE POISONOUS TREE'**

22 The Fourth Amendment of the United States Constitution
23 provides that "the right of the people to be secure in their
24 persons, houses, papers, and effects, against unreasonable
25 searches and seizures, shall not be violated". U.S. Const.
26 Amend. IV. Nothing is clearer than that the Fourth Amendment
27 was meant to prevent wholesale intrusions upon the personal
28 security of our citizenry, whether these intrusions be termed

1 'arrests' or 'investigatory detentions'. United States v.
2 Chamberlin, 644 F.2d 1262, 1266 (9th Cir., 1979).

3 The exclusionary rule, which bars the admission of evidence
4 obtained in violation of the Constitution, extends beyond the
5 direct products of government misconduct. United States v.
6 Ramirez-Sandoval, 872 F.2d 1392, 1395 (9th Cir. 1989). The
7 exclusionary sanction applies to any "fruits" of a
8 constitutional violation - whether such evidence be tangible,
9 physical material actually seized in an illegal search, items
10 observed or words overheard in the course of the unlawful
11 activity, or confessions or statements of the accused obtained
12 during an illegal arrest and detention. United States v.
13 Crews, 445 U.S. 463, 470, 100 S.Ct. 1244 (1980).

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18 **A. Even If The Government Produces Evidence, Sufficient**
19 **To Support A Finding Of 'Reasonable Suspicion,' The**
20 **Investigative Stop, Is Nevertheless Unjustifiable,**
21 **Because It Transmuted Into A De Facto Arrest, When**
22 **Border Patrol Agent Stallings Re-Conducted The**
23 **Immigration Inspection, With A Full Knowledge That**
24 **Defendant AVETYANTS Possessed The Proper Immigration**
25 **Documents**

26 The Fourth Amendment permits police officers to approach
27 individuals at random in airports to ask them questions, and to
28 request consent to search their luggage, so long as a
reasonable person would understand that he or she could refuse
to cooperate. Florida. v. Bostick, 501 U.S. 429, 431 (1991).

1 "What has evolved from the cases is a determination that an
2 initially consensual encounter between a police officer and a
3 citizen can be transformed into a seizure or detention within
4 the meaning of the Fourth Amendment, if, in view of all of the
5 circumstances surrounding the incident, a reasonable person
6 would have believed that he was not free to leave." Immigration
7 & Naturalization Service v. Delgado, 466 U.S. 210, 215 (1984).
8

9 **"The test for determining when a Terry-stop becomes an arrest,**
10 **is whether the detention exceeded a brief stop, interrogation**
11 **and, under proper circumstances..."** United States v.
12 Washington, 387 F.3d 1060, 1069 (9th Cir., 2004). **"Then, if**
13 **the stop proceeds beyond these limitations, an arrest occurs**
14 **if, under the circumstances, a reasonable person would conclude**
15 **that he was not free to leave after brief questioning."** Id.
16

17 In other words, whenever a police officer accosts an individual
18 and restrains his freedom to walk away, he has 'seized' that
19 person [and can no longer justify the inexistence of a warrant
20 by a mere showing of a 'reasonable suspicion']. Dunaway v. New
21 York, 442 U.S. 200, 207, f.n. 6 (1979).
22

23 Here, it is unmistakably clear that defendant AVETYANTS'
24 second stop turned out to be nothing short of an arrest without
25 probable cause or a warrant. After initiating the second
26 contact with defendant AVETYANTS at the Border Field State
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1 Park, Agent Stallings : a) approached the vehicle, b)
2 identified himself as a U.S. Border Patrol Agent, c) began to
3 conduct an immigration inspection which was conducted earlier
4 by Border Patrol Agent Zoetewey in the presence of Agent
5 Stallings.
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7 The discovery provided by the Government thus far has not
8 presented any specific articulable facts which led Border
9 Patrol Agent Stallings to have a reasonable suspicion that
10 defendant AVETYANTS had, or was about to commit a crime. The
11 defendant was previously inspected for the immigration
12 document. Border Patrol Agent Stallings was present at the
13 inspection and he had a full knowledge that the defendant
14 possessed the proper immigration documents. The Border Patrol
15 Agent Stallings had no reason to re-conduct the immigration
16 inspection of defendant AVETYANTS. As such, at the time when
17 the agent began the immigration inspection, it is evident that
18 the stop of defendant AVETYANTS was an arrest, with no showing
19 of probable cause, or prior attainment of an arrest warrant.
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23 **B. Border Patrol Agent Stallings Had No Reasonable**
24 **Suspicion To Justify Defendant Avetyants'**
25 **Second Stop**

26 Roving Border Patrol agents must have a reasonable suspicion
27 based on specific articulable facts that the vehicle contains
28 aliens who may be illegally in the country. United States v.

1 Brignoni-Ponce, 422 U.S. 873, 884 (1975); Gonzalez-Rivera v.
2 I.N.S., 22 F.3d 1441, 1445 (1994). While the experience of the
3 agents may be considered, the basis of reasonable suspicion
4 must be based on objective factors and not the subjective
5 impressions of an officer. Gonzalez-Rivera at 1445; Nicacio v.
6 I.N.S., 797 F.2d 700, 705 (9th Cir. 1985).

8 In order to determine whether an agent's suspicion was
9 reasonable, all the factors claimed to give rise to the stop
10 must be examined. The Ninth Circuit has held that when Border
11 Patrol agents use factors which describe too many legitimate
12 individuals, the factors do not create reasonable suspicion.
13 United States v. Salinas, 940 F.2d 392 (9th Cir. 1991); United
14 States v. Hernandez-Alvarado, 891 F.2d 1414 (9th Cir. 1989).

16 In Salinas, the Border Patrol agents relied on six
17 observations before making the stop: 1) the defendant drove an
18 old model car with a large trunk; 2) the car appeared heavily
19 loaded; 3) the officer saw fresh handprints on the trunk; 4)
20 the defendant appeared to be of Spanish or Mexican origin; 5)
21 the car was registered in a town know to have a high
22 concentration of drug and alien smuggling; and 6) defendant
23 glanced at the Border Patrol Officer. Salinas, 940 F.2d at 393-
24 94. The court held that these factors did not justify the
25 stop. Id. at 394. The court explained, "Thousands of United
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1 States citizens of Mexican ancestry drive old cars on perfectly
2 legitimate errands with 100 pounds of potatoes or carpenter
3 tools or other commodities weighing down the rear springs." Id.
4 at 395.
5

6 On April 26, 2008 the only "facts" within the Border
7 Patrol Agent Stallings' knowledge at the time he stopped
8 defendant AVETYANTS were that (1) he observed the same three
9 individuals two hours after the vehicle stop walking in the
10 park; (2) thirty minutes later he was exiting the area and
11 noticed the same car parked at the entrance to the park; (3)
12 all four doors of the vehicle were allegedly open and four
13 individuals were getting ready to enter the vehicle. Even
14 arguendo if all of this is true, these facts do not rise even
15 to the level of those enumerated in Hernandez-Alverado.
16
17 Clearly, these factors fail to establish reasonable suspicion
18 to conduct an investigatory stop of defendant AVETYANTS.
19

20 The Ninth Circuit has stated, "[i]n exercising their
21 judgment, however, police officers may not infringe the privacy
22 rights of individuals without just cause, regardless of any
23 eventual determination of guilt." Hernandez-Alvarado, 891 F.2d
24 at 1419.
25

26 In United States v. Kerr, 817 F.2d 1384 (9th Cir. 1987) the
27 Ninth Circuit stated:
28

1 "We recognize that effective law enforcement
2 is often predicated on hunches developed from
3 a police officer's years of experience in
4 detecting criminal activity. However,
5 underlying every Fourth Amendment analysis is
6 a balancing between two competing concerns—
7 society's interest in effective law
8 enforcement and the individual's privacy and
9 liberty interest. A Fourth Amendment stop
10 based on hunches alone will not withstand
11 constitutional scrutiny." Id. at 1387
12 (emphasis added).

13 **III. ALL ALLEGED STATEMENTS OBTAINED DURING THE**
14 **INITIAL AND THE SECOND STOP OF THE DEFENDANTS**
15 **MUST BE SUPPRESSED PURSUANT TO MIRANDA v.**
16 **ARIZONA OR BECAUSE OF ACTUAL INVOLUNTARINESS**

17 The Fifth Amendment privilege against self-incrimination
18 protects the individual from being compelled to incriminate
19 himself in any manner. Miranda v. Arizona, 384 U.S. 436, 476
20 (1966). The privilege is available outside of criminal court
21 proceedings, and serves to protect persons in all settings in
22 which their freedom of action is curtailed in any significant
23 way from being compelled to incriminate themselves. Id. at 467.

24 **Incriminating statements may not be used without the full**
25 **warnings and effective waiver required for any other statement.**

26 Id. at 477. Incriminating statements are those which the
27 prosecution may seek to introduce at trial, regardless of
28 whether they are inculpatory or exculpatory. United States v.
Morin, 665 F. 2d 765 (5th Cir., 1982).

1 In Morin, supra, the defendant was being tracked by law
2 enforcement, who had full knowledge that the defendant had
3 luggage on board the plane, and suspected that it contained
4 narcotics. The defendant was stopped and questioned, without
5 prior Miranda advisements, at an airport terminal, at which
6 point the officers asked him if he had any luggage with him.
7 The defendant disclaimed ownership of his luggage, and by doing
8 so allowed the police to search his luggage, because the denial
9 constituted a relinquishment of any reasonable expectation of
10 privacy therein. Id. Following the arrest, during the
11 subsequent trial, the prosecution was permitted to introduce
12 the defendant's disclaimer statement. Id. On appeal, the Fifth
13 Circuit Court of Appeals held that the statement of
14 abandonment, which the defendant made in the course of the
15 custodial interrogation, should not have been admitted, because
16 it clearly incriminated him. Id. at 770-771.

20 In the instant case, as argued above, it is the defendant
21 AVETYANTS' position that the initial stop was not justified and
22 that there can be no rationalization of the need to stop,
23 detain and interrogate the defendants a second time. The
24 Border Patrol Agent Stallings began questioning the defendants
25 after he obtained their documents for the immigration
26 inspection. It is evident that the defendants were not free to
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1 leave. The Agent had no reason to re-inspect the immigration
2 status of the defendants where he had full knowledge that they
3 indeed possessed the proper immigration documents.

4 The Border Patrol Agent's line of questioning, was designed,
5 and intended to elicit incriminating evidence. The defendants
6 were questioned without first being advised of their Miranda
7 rights. Since the Miranda safeguards were not complied with,
8 the defendants' statements must be excluded.

9 The policies underlying the exclusionary rule of the
10 Fourth Amendment do not invite any logical distinction between
11 physical and verbal evidence. United States v. Ceccolini, 435
12 U.S. 268, 275 (1978). Verbal evidence which derives so
13 immediately from an unauthorized arrest is no less the "fruit"
14 of official illegality than the more common tangible fruits of
15 the unwarranted intrusion. See also, United States v. Patzer,
16 277 F.3d 1080, 1086 (9th Cir., 2002), United States v.
17 Basurto, 497 F.2d 781, 791 (9th Cir., 1974).

18 Unless the arresting Border Patrol Agent Stallings is able
19 to articulate facts to support a finding that reasonable
20 suspicion existed to justify stopping of defendant AVETYANTS,
21 all evidence gained from the stop, including the agent's
22 observations and any statements by the defendant or the co-
23 defendants or the material witness, must be suppressed as the
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1 fruits of an illegal stop. Wong Sun v. United States, 371 U.S.
2 471 (1963).

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5 **IV. THE BORDER PATROL AGENT STALLINGS NEVER OBTAINED**
6 **DEFENDANT AVETYANTS' CONSENT TO SEARCH THE VEHICLE**

7 **A. The Border Patrol Agent Stallings Obtained**
8 **Defendant Avetyants' Consent As A Result Of**
9 **An Illegal Detention**

10 Any consent given during an unlawful detention is invalid,
11 and evidence obtained must be suppressed, Florida v. Royer, 460
12 U.S. 491 (1983).

13 In Florida v. Royer, 460 U.S. 491 (1983), after a brief
14 conversation, two officers requested Royer accompany them to a
15 small room, and without seeking Royer's consent, brought
16 Royer's checked luggage to the room. The officers then asked
17 Royer for consent to a search of his suitcase. In response,
18 Royer unlocked suitcases which uncovered marijuana. The United
19 States Supreme Court concluded,
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21 "We also agree that had Royer voluntarily
22 consented to the search of his luggage while
23 he was justifiably being detained on
24 reasonable suspicion, the products of the
25 search would be admissible against him. We
26 have concluded, however, that at the time
27 Royer produced the key to the suitcase, the
28 detention to which he was then subjected was
a more serious intrusion on his personal
liberty than is allowable on mere suspicion
of criminal activity." Florida v. Royer, at
p. 502.

1 As argued above, Border Patrol Agents illegally detained
2 defendant AVETYANTS. Any consent by the defendant to search
3 his vehicle was as a result of the illegal detention, and thus
4 any evidence seized must be suppressed.
5

6 **B. DEFENDANT AVETYANTS DID NOT PROVIDE A KNOWING AND**
7 **VOLUNTARILY CONSENT TO SEARCH HIS VEHICLE**

8 Valid consent to search is an exception to the warrant
9 requirement of the Fourth Amendment. Schneckloth v. Bustamonte,
10 412 U.S. 218, 219 (1973).
11

12 In order to establish the validity of a consent to search,
13 the government bears the heavy burden of demonstrating the
14 consent was freely and voluntarily given, and "not a mere
15 submission to an expressed or implied assertion of authority."
16 Bumper v. North Carolina, 391 U.S. 543 (1968); Schneckloth v.
17 Bustamonte, supra, at 222. Whether consent to search was
18 voluntarily provided is a factual question "to be determined
19 from the totality of all the circumstances." Schneckloth v.
20 Bustamonte, at 227. Evidence obtained as a result of an
21 involuntary consent must be suppressed as a fruit of an illegal
22 detention. Florida v. Royer, (1983) 460 U.S. 491 (1983).
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25 Among the factors that tend to show a lack of
26 voluntariness are: (1) whether the person was "in custody",
27 U.S. v. Chan-Jimenez, 125 F.3d 1324, 1327 (9TH Cir. 1997); (2)
28

1 whether the officer failed to administer Miranda warnings, U.S.
2 v. Childs, 944 F.2d 491, 496 (9th Cir. 1991)[Consent voluntary
3 where defendant advised of his Miranda rights, was told of his
4 right to refuse consent, and signed a written consent form];
5
6 (3) whether the officer informed the person of his right to
7 refuse to consent, United States v. Watson, (1976) 423 U.S. 411
8 (1976); (4) the person was told that a search warrant could be
9 obtained, U.S. v. Chan-Jimenez, 125 F.3d 1324, 1327 (9th Cir.
10 1997); (5) an officer's assertion of commands or directions,
11 U.S. v. Chan-Jimenez, 125 F.3d 1324 (9th Cir. 1997). Although
12 the presence or absence of one of these factors is not
13 dispositive of the voluntariness inquiry in any given case,
14 consent is usually not found if several of these factors exist,
15 U.S. v. Chan-Jimenez, (9th Cir 1997) 125 F.3d 1324, 1327, fn. 3
16 (9th. Cir. 1997).

19 In the present case, defendant AVETYANTS was illegally
20 detained; he was not advised of his right to refuse consent; he
21 never signed a written consent form; he was not advised per
22 Miranda. If defendant AVETYANTS appeared to give consent, it
23 was only in submission of Border Patrol Agent Stallings'
24 expressed and implied exercise of authority.

26 The Border Patrol Agent Stallings' actions in this case
27 bear little resemblance to the appropriate Constitutional
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1 standard and any "consent" which allegedly was obtained during
2 this illegal detention is invalid. These are exactly the types
3 of fishing expeditions which the Fourth Amendment proscribes.
4

5
6 **V. LEAVE TO FILE FURTHER MOTIONS**

7 Defendant AVETYANTS respectfully requests the opportunity
8 to file further motions and/or supplement the motions already
9 filed after reviewing additional discovery and conducting
10 independent investigation.
11

12
13 **VI. CONCLUSION**

14 Border Patrol Agents Zoetewey and Stallings violated
15 defendant AVETYANTS' Fourth Amendment rights when the defendant
16 was illegally detained, by the Agents' failure to act in a
17 reasonable manner on the day in question. Agent Stallings had
18 no legitimate justification, nor did he have any reasonable
19 suspicion or probable cause to believe that the defendant was
20 in violation of any law and was involved in criminal activity.
21

22 The defendant's Fourth Amendment rights were infringed
23 upon by the Border Patrol Agents. The evidence in this case
24 flows from an illegal detention, an invalid consent, and an
25 illegal search. It is tainted by illegality, and any and all
26 evidence that is seized by the Agents must be suppressed as
27 fruits of the poisonous tree.
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Dated: August 4, 2008

Respectfully submitted,

 /s/ Garo Ghazarian
GARO B. GHAZARIAN
Attorney for Defendant
ARA E. AVETYANTS